IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Central Excise Appeal No. 44 of 2007
Date of Decision : November 01, 2007

Commissioner of Central Excise, Gurgaon

...Appellant

versus

M/S Alcatel Modi Network System Limited

...Respondent

CORAM : HON'BLE MR. JUSTICE M. M. KUMAR
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present: Mr. Sanjiv Kaushik, Advocate,
for the appellant.

M. M. KUMAR, J. (ORAL)

This appeal filed under Section 35 G of the Central Excise Act, 1944 (for brevity 'the Act') is directed against order dated 12.09.2006 (P-3) passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for brevity 'the Tribunal'). By the impugned order, the Tribunal has allowed the refund claim made by the assessee-respondent amounting to Rs. 2,37,716/-. However, the revenue has claimed that the following substantial question of law would arise for determination of this Court :

> "Whether refund claim can be filed, after expiry of six months from the date of payment under Section 11 - B of Central Excise Act, 1944 ?"

Brief facts of the case would be necessary for disposal of the controversy raised in the instant appeal. Earlier to the filing of refund application, the revenue-appellant did not allow any deductions in respect of freight and transportation costs from the assessable value to the assessee-respondent, in respect of the period commencing from 01.04.1996 to March, 1997. The assessee-respondent challenged the order passed by the revenue-appellant and eventually, the Tribunal decided in their favour. The order of the Tribunal has attained finality, which led to the filing of application for refund by the assessee-respondent. The adjudicating authority vide its order dated 14.10.1999 (P-1), rejected the claim for refund on two grounds that (a) it was barred by time and it amounted to unjust enrichment. On further appeal, the Commissioner upheld the view of the adjudicating authority on the question of limitation but reversed the finding of undue enrichment. Aggrieved by the order-in-appeal, the assessee-respondent filed further appeal and the Tribunal by placing reliance on its earlier judgment in the case of **"CENTRAL EXCISE VS. ELECTRO STEEL CASTING LTD." 2005 (186) E. L. T 349**, decided the issue concerning limitation in favour of the assessee-respondent by taking the view that once the payment of duty has been deposited under protest, then the period of limitation is not to apply as per proviso Second Section 11-B of the Act. The view

of the Tribunal is discernible from paras 5 and 6 of its order which reads thus :

> "Considered the submissions made by both sides and perused records. It is undisputed the appellant was contesting the matter regarding the disallowance of deductions on transportation and insurance. If that be so, and if the appellant's appeal against disallowance of deduction is settled in their favour and is final, they cannot barred from claiming the refund of the duty paid by them on such expenses ....."

> "In this case before me, since it is not disputed that the appellants were contesting the issue of disallowance of deductions on transportation and freight, the decision of the Tribunal in the case of Electro Steel squarely covers the issue. Accordingly, respectfully following the same, impugned order is set aside as regards to the issue of time bar. The impugned order is set aside and appeal is allowed consequential relief, if any."

In its earlier order passed in the case of **Electro Steel Casting Ltd.** (supra), the Tribunal has placed reliance on authoritative judgment of Hon'ble the Supreme Court in the case of "**Mafatlal Industries Ltd. vs. Union of India" (1997) 89 E. L. T 247 (S.C).**It has been laid down by Hon'ble the Supreme Court

that those cases which were settled, would not be re-opined and no refund claim was entertainable. In other words, those cases were eligible for refund where disputes were raised and liability to pay duty was contested.

After hearing the learned counsel at some length, we have reached the conclusion that no question of law, much less, a substantial question of law would arise for determination of this Court. The second proviso to Section 11-B of the Act specifically provides that the period of limitation is not to apply to a case where the duty was deposited under protest. In the instant case, it has been found that once the assessee-respondent has been contesting the main matter challenging the imposition of duty upto the Tribunal in earlier proceeding then it has to be concluded that he had deposited duty under protest and therefore, the second proviso in Section 11-B would govern the issue. We further find another valid reason is available to assessee-respondent namely once it has been found as a fact by the Commissioner (Appeals) that the incidence of duty has not been passed on to others and that there was no unjust enrichment then the retention of such an amount would be wholly unauthorized by virtue of provisions of Article 265 of the Constitution. Moreover, the findings recorded by the Commissioner (Appeals) regarding undue enrichment has been duly accepted by the revenue-appellant, because no appeal was preferred by it before the Tribunal. Therefore, we are of the

considered view that the order passed by the Tribunal does not suffer from any legal infirmity warranting interference of this Court. Therefore, no question of law much less a substantial question of law would arise for determination of this Court. The appeal is wholly without merit and the same is liable to be dismissed.

For the reasons aforementioned, this appeal fails and the same is dismissed.

(M. M. KUMAR)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

NOVEMBER 01, 2007
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